U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 2 9 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an IT consulting business. On December 9, 2014 it filed a Form I-140, Immigrant Petition for Alien Worker (receipt number), seeking to permanently employ the beneficiary in the United States as a computer and information systems manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). Under this statutory provision immigrant classification may be granted to members of the professions holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business. The petitioner did not specify which category – advanced degree professional or alien of exceptional ability – was being sought for the beneficiary. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on June 30, 2014, and certified by the DOL (labor certification) on November 19, 2014.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" and "aliens of exceptional ability" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
>
> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business.

The regulation at 8 C.F.R. § 204.5(k)(4)(i) provides, in pertinent part, as follows:

> Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In a decision dated December 20, 2014, the Director denied the petition on the ground that the minimum educational and experience requirements on the labor certification did not demonstrate that a master's degree or a baccalaureate degree and five years of progressively responsible experience is required to qualify for the job. Therefore, the labor certification did not support the requested classification of advanced degree professional. The Director also stated that he did not consider whether the beneficiary qualified for classification as an alien of exceptional ability since the petitioner made no representations in this regard.

The petitioner filed a timely appeal on Form I-290B. As the "basis of appeal" the petitioner asserted that the Director's decision was faulty because (1) he misinterpreted the minimum education and experience required on the labor certification, which is a bachelor's degree and four years of qualifying experience, and (2) he failed to consider whether the salary being paid for the proffered position meant that an alien of exceptional ability was required. On the Form I-290B, which was received by U.S. Citizenship and Immigration Services (USCIS) on January 22, 2015, the petitioner indicated that a brief and/or additional evidence would be submitted within 30 days. No such materials were submitted in the next 30 days, however, or at any time up to the date of this decision. Therefore, the record is complete. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner's appeal has no merit since it affirms that the minimum education and experience required for the job, as stated in the labor certification, is a bachelor's degree or a foreign educational equivalent (in electrical engineering, computer science, engineering, or technology) and 48 months (4 years) of qualifying experience. (Part H, lines 4, 4-B, 6, 7, 7-A, 9, 10, 10-A, and 10-B of the ETA Form 9089.) The labor certification specifies that no alternate combination of education and experience is acceptable. (Part H, line 8 of the ETA Form 9089.) These specifications on the ETA Form 9089 do not square with the definition of "advanced degree" in 8 C.F.R. § 204.5(k)(2), which requires either (1) a U.S. or foreign equivalent degree "above that of baccalaureate" or (2) a U.S. baccalaureate or foreign equivalent degree plus five years of qualifying experience. In this case, the labor certification requirements of a bachelor's degree and four years of qualifying experience do not represent the minimum requirements for an advanced degree professional. Therefore, the labor certification does not support the petition for an advanced degree professional in conformance with 8 C.F.R. § 204.5(k)(4)(i).

Nor is there any merit to the petitioner's alternative claim that the salary being paid for the proffered position indicates that an alien of exceptional ability is required for the job. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If a petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the antecedent regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 1119-20. Only aliens whose achievements demonstrate "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 1119-22.

In the instant proceeding, the petitioner has not set forth a concrete claim for classification of the beneficiary as an alien of exceptional ability, nor submitted the requisite evidence to satisfy the antecedent regulatory requirement for a final merits determination by USCIS. The petitioner has not even explained how the salary paid for the proffered position (which the beneficiary has apparaently occupied since July 2014) demonstrates the beneficiary's exceptional ability. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Beyond the decision of the Director in this proceeding, we note that the petitioner on January 7, 2015 filed another Form I-140 on behalf of the beneficiary (receipt number [redacted] with the same labor certification – this time seeking the beneficiary's classification as a professional under section 203(b)(A)(ii) of the Act – which was denied by the Director on the ground that the petitioner did not establish that it had the ability to pay the proffered wage to the instant beneficiary and all of its other I-140 beneficiaries. A petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition (in this case, June 30, 2014)[1] up to the date the beneficiary acquires legal permanent resident status. *See* 8 C.F.R. § 204.5(k)(2). When a petitioner has filed petitions for multiple beneficiaries that are pending simultaneously, it must show that it has the ability to provide the proffered wages to each and every beneficiary from the priority date of the instant petition onward. *Id. See also Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). As noted by the Director in the denial decision on February 2, 2015, there were 12 other beneficiaries of I-140 petitions in 2014, in addition to the instant beneficiary, all of whom were in the petitioner's employ. Only two of the beneficiaries received compensation at or above their proffered wages. The instant beneficiary received wages that were $68,657 below his proffered wage. For the beneficiaries as a whole, the cumulative shortfall between their proffered wages and

[1] The priority date of a Form I-140 petition is the date the underlying labor certification application is accepted for processing by the DOL.

the amounts they were actually paid in 2014 amounted to $290,896. The petitioner's federal income tax return (Form 1120S) for 2013 showed that its net income for that year was $50,036 and its net current assets totaled $154,997. Neither of these figures was large enough to make up the difference between the cumulative proffered wages and the amounts actually paid to the beneficiaries in 2014. Based on the evidence of record, therefore, the Director determined that the petitioner had failed to establish its ability to pay the proffered wages of the instant beneficiary and all of its other I-140 beneficiaries. We find that this determination is equally applicable in the instant proceeding.

Based on the foregoing discussion, we determine that (1) the labor certification does not support the petition for an advanced degree professional, (2) the petitioner has not established that the beneficiary qualifies for classification as an alien of exceptional ability, and (3) the petitioner has not established its ability to pay the proffered wages of the instant beneficiary and all of its other I-140 beneficiaries from the priority date of the instant petition up to the present.

For the reasons stated above, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition remains denied.